DOCUMENT RESUME

ED 295 174 CS 211 267

AUTHOR Day, Louis A.; Butler, John M.
TITLE Hazelwood School District v. Kuhlmeier: A Constitutional Retreat or Sound Public Policy?
PUB DATE Jul 88
NOTE 53p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (71st, Portland, OR, July 2-5, 1988).
PUB TYPE Speeches/Conference Papers (150) -- Viewpoints (120)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Administrator Role; Constitutional Law; Educational Policy; *Freedom of Speech; *Government School Relationship; *Journalism; Journalism Education; News Media; Press Opinion; Progressive Education; *Public Policy; Public Schools; School Law; School Policy; School Responsibility; Secondary Education; Student Rights
IDENTIFIERS Educational Ideologies; *First Amendment; *Hazelwood School District v Kuhlmeier; Journalists; Press Law; Press Responsibility; Press Role; Supreme Court; Tinker v Des Moines Independent School District

ABSTRACT

The Supreme Court's consideration of the issue of First Amendment protection for the student press is examined in this paper by analyzing "Hazelwood School District v. Kuhlmeier," where the court ruled that the school is the publisher and that the principal has the right to regulate the content of the newspaper in "any reasonable manner." The paper argues that--viewed in a broad historical perspective--"Hazelwood" is not a constitutional retreat, but rather predicated upon reasonable philosophical and educational theories and principles of sound public policy. First, the paper traces the evolution of conflicting educational ideologies within the American judicial system. Next, the paper attempts to demonstrate that "Hazelwood" is not just another move by a conservative Court to restrain individual liberties but represents a belief that school officials should be accorded substantial deference in their formulation and implementation of educational policy. The paper also explores several rationales for a diminished ("limited capacity") free expression right within the public academy, the cumulative effect of which should be to allow teachers and school officials to inculcate immature minds with a sense of social responsibility and morality without irreparably impairing the aspiring young journalist's enthusiasm for individual self-expression. The paper concludes that "Hazelwood" represents a restoration of the proper balance between the pedagogical mission of the public schools and the role of the student press. (One hundred and ninety-three notes are included.) (MS)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED295174

Hazelwood School District v. Kuhlmeier: A Constitutional Retreat or Sound Public Policy?

by

Louis A. Day, Ph.D.
John M. Butler, Ph.D.

Manship School of Journalism
Louisiana State University
Baton Rouge, LA 70803-7202

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Louis A. Day
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)"

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

A Paper Presented to the Secondary Education Division, Association for Education in Journalism and Mass Communication, Portland, Oregon, July 1988.

CS211267

BEST COPY AVAILABLE

Abstract

The constitutional cornerstone for the free speech rights of high school students was laid in 1969 in Tinker v. Des Moines Independent Community School District, in which the Supreme Court ruled that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." But the Court had never considered the issue of First Amendment protection for the student press until January of this year when the Court provided officials with broad authority to censor school-supported publications. In Hazelwood School District v. Kuhlmeier the Court ruled that the school is the publisher and that the principal has the right to regulate the content of the newspaper in "any reasonable manner." Critics of the decision viewed Hazelwood as a constitutional retreat. But when viewed in the broader historical perspective, Hazelwood is predicated upon reasonable philosophical and educational theories and principles of sound public policy.

This paper traces the evolution of the conflicting educational ideologies within the American judicial system. In so doing, it attempts to demonstrate that Hazelwood is not just another move by a conservative Court to restrain individual liberties but represents a belief that school officials should be accorded substantial deference in their formulation and implementation of educational policy. The authors also explore several rationales for a diminished ("limited capacity") free expression right within the public academy, the cumulative effect of which should be to allow teachers and school officials to inculcate immature minds with a sense of social responsibility and morality without irreparably impairing the aspiring young journalist's enthusiasm for individual self-expression. The authors conclude that Hazelwood represents a restoration of the proper balance between the pedagogical mission of the public schools and the role of the student press.

Hazelwood School District v. Kuhlmeier: A Constitutional Retreat or Sound Educational Policy?

I. Introduction

In a free society there is sometimes a constitutional collision between the rights of individuals and the interests of the state in restricting those liberties. In Twentieth Century America this axiom has figured prominently in the judicial system's concern with the role of public education. The complexities of modern society, the attack upon traditional American values and the increased demands placed upon educational institutions have accelerated the public concern and litigation over the relative roles of students, teachers and administrators in the educational process.[1] This debate inevitably involves difficult policy choices between individual rights and authority, a conundrum which is represented by the controversy over the right of free expression within the public schools.

The constitutional cornerstone for the free speech rights of high school students was laid in 1969 in Tinker v. Des Moines Independent Community School District,[2] in which the Supreme Court ruled that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] But the Tinker decision was really the zenith of more than forty years of decision-making, during which time the Court's opinions were increasingly influenced by a "progressive" model of education that emphasized a participatory educational process with maximum student interaction and independent thought.[4] Since the Tinker case, however, the Court has steadily retreated from this progressive ideology in an attempt to restore the traditional authority of school officials to control the dynamics of the educational environment.

The death-knell for the Tinker approach to free expression in the public

schools may have come in January 1988, when the Supreme Court, in Hazelwood School District v. Kuhlmeier,[5] provided officials with broad authority to censor school-supported newspapers. This decision prompted reactions from civil libertarians, professional media practitioners and high school journalists, which ranged from disappointment to anger. A cursory examination of the majority opinion might lead one to conclude that Hazelwood is a constitutional retreat, an affront to the dignity of scholastic journalism. But when viewed in the broader historical perspective Hazelwood is predicated upon principles of sound public policy and represents a restoration of the proper balance between the pedagogical mission of the public schools and the role of the student press.

This paper traces the evolution of the conflicting educational ideologies within the American judicial system. In so doing, it attempts to demonstrate that Hazelwood is not just another move by a conservative Court to restrain individual liberties but represents a belief by a majority of the justices that school officials should be accorded substantial deference in their formulation and implementation of educational policy. The authors also explore several rationales for a diminished ("limited capacity") free expression right within the public educational enterprise, the cumulative effect of which should be to allow teachers and school officials to inculcate immature minds with a sense of social responsibility and morality without irreparably impairing the aspiring young journalist's enthusiasm for individual self-expression.

II. The Evolution of American Educational Ideology

Schools have never existed in a vacuum separate from society and its expectations. At the beginning of the colonial period, orthodoxies in

theology, philosophy, and politics dominated the schools. Children were looked upon as sinful creatures who could be ruled only by harsh discipline, fear, and unrelenting obedience.[6] Washington had counseled in his "Farewell Address": "Promote then as an object of primary importance Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened."[7] Jefferson had reflected almost a half century of effort on behalf of universal education when he wrote in 1816: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."[8]

The primary purpose of the schools in the early period of American history was to design a universal, free, public school, that would promote free institutions and free citizenship. For the first 100 years of the Republic, the need for creating the common bonds and loyalties of a free community were paramount. What we today would call secondary education was offered in Latin grammar schools. The immediate reason for stress on Latin was that Harvard College required it for admission because the main bodies of knowledge throughout Europe since the days of the Roman Republic and the Roman world had been written in Latin. The major thrust of educational thought centered around the demands made in establishing a republican form of government. Students were encouraged to learn the classics since that prepared the capable students for a career equal to those peers obtaining a European education. Additionally, the students were expected to prepare themselves to be leaders of the new republic. "Believing," said the Common School Assistant, "that the mind of every citizen of every republic is the common property of society, and constitutes the basis of its strength and happiness, it is considered the peculiar duty of a free government, like

ours, to encourage and extend the improvement and cultivation of the intellectual energies of the whole."[9]

Other leaders argued it was the responsibility of the republican community to fulfill the natural right of the individual to an education, a right which accrued through the existence of "a great, immutable principle of natural law, or natural ethics---a principle antecedent to all human institutions and incapable of being abrogated by any ordinances of man--a principle of divine origin, clearly legible in the ways of Providence as those ways are manifested in the order of nature and in the history of the race."[10]

During the century of the republican education, most Americans chose the common school, which embraced a nonsectarian religious outlook. Private, religious schools were available for those pursuing an education couched in religious dogmas. The laissez-faire political and economic views of that period (1750-1825) thrust aside public education partially because of its historic association with the centralized theocractic New England absolutism, and the educational focus switched to the political arena.[11]

In order to create a free society of different viewpoints, the only institution of a free society which serves everyone and is controlled by everyone is the government. The prevailing thought was that the government should control common schools. And to keep the schools close to the people supporters of the common school believed state and local governments, rather than the national government, should control the school boards. To keep schools free from political and partisan prejudices, the people would elect school boards subject to but separate from the executive, legislative, and judicial branches of the government.[12]

During the 1800's the growing country needed cheap labor, which it

obtained with the mass of immigrants arriving from Europe and elsewhere. With the rising sense of nationalism prevailing among American people, leaders began to fear the presence of a large body of persons whose patterns of thought and living were incompatible with the American way of life.[13] Not only was society concerned about its own citizens and their education for a new republic, but also it was increasingly concerned with immigrants being acculturated into the way American's thought. The perception grew that the schools had to help synthesize people around a demand for a new, functional, and positive conception of the school's role in society. Thus developed the "cultural transmission" theory of educating the masses.

The emphasis was upon the view that educating consists of transmitting knowledge, skills, and social and moral rules of the culture. Knowledge and rules of the culture may be rapidly changing or they may be static. In this case it is assumed that "education is the transmission of the culturally given."[14] The school had to do something which could no longer be left haphazardly to the church, the family, or even simple participation in the life of the community.[15]

This cultural transmission concept is rooted in the classical academic tradition of Western education. Traditional educators believe their primary task is the transmission to the present generation bodies of information and rules of values collected in the past; they believe that the educator's job is the direct instruction of such information and rules.

The Superintendent of Schools in New York City, in 1819, addressed this problem of assimilation when he described the educational goals of the schools relative to the values of the immigrants: "broadly speaking an appreciation of the institutions of this country, absolute forgetfulness of all obligations or connections with other countries because of descent or

birth."[16] Opposition to the growing number of immigrants was evident in the statements of Henry Pratt Fairchild, a New York University sociologists, who argued:

> The highest service of America to mankind is to point the way to demonstrate the possibilities, to lead onward to the goal of human happiness. Any force that tends to impair our capacity for leadership is a menace to mankind and a flagrant violation of the spirit of liberalism.

Unrestricted immigration was such a force. It was slowly,insidiously, irresistibly, eating away the very heart of the United States. The American nationality itself was losing all form and symmetry and its unique character.[17] Percey Stickney Grant phrased it thus:

> Let us be careful not to put America into the class of the oppressors. Let us rise to an eminence higher than that occupied by Washington or Lincoln, to a new Americanism which is not afraid of blending in the Western world of races seeking freedom. Our present independence, not federal unity, but racial amalgamation is the historic problem of the present, with all it implies in purification and revision of old social, religious, and political ideals, with all its demands in a new symphony outside of blood and race, and in a new willingness to forego old-time privileges.[18]

Robert Dale Owen, early leader in the labor movement, said:

> I believe in a National System of Equal, Republican, Protective, Practical Education, the sole regenerator of profligate age, and the only redeemer of the suffering country from the equal curses of chilling poverty and corrupting riches, of gnawing want and destroying debauchery of blind ignorance and unprincipled intrigue.[19]

Equal concern about the assimilation of the masses came from the rising labor classes who feared the political and social consequences of the new industry and commerce and waged a vigorous campaign for equality of citizenship. They saw that equal education might prevent a rigid class stratification.

James Madison had asserted in 1822, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a

Farce or a Tragedy or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[20] In order to maintain control over the schools and to perpetuate the concept of nationalism state school agencies were "designed to assure that schools would serve the whole public and would be controlled by the public through school boards of education, not through the regular agencies of the state or local governments. This is why the term "public schools," does not refer simply to state schools or government schools, as they are often called in other countries.[21]

In the 1820's, 1830's, and 1840's it was decided that a state government, responsive to public control, could serve freedom as well as, if not better than, the hundreds of local school districts can do. Massachusetts established a state board of education in 1837 with Horace Mann as secretary. Connecticut followed in 1839. These state agencies set the minimum standards for all schools of the state. The schools were created to provide citizenship training, character education, and a means by which every child might advance up the economic and social scale as far as his talents would carry him. The debate as to what this type of education would do for the student created discussion among educational leaders and society in general. Mercer saw this kind of equalizing or leveling education as a means of perpetuating the American democratic structure by preventing differences in economic status from undermining it.[22] Others argued that the young were incapable of deciding what type of education they needed or wanted:

> Obviously, the freedom of the immature to choose what they shall learn is of negligible consequences compared with their later freedom from want, fear, fraud, superstition, and error which may fetter the ignorant as cruelly as the chains of the slave driver---the price of this freedom is systematic and sustained effort often devoted to the mastery of materials the significance of which must be at the time taken on faith.[23]

As the country moved toward a more democratic concept of itself, and was not so concerned with a republican ideal where education was provided for a few, the goal of education was to "provide more education for more people." Reformers in the educational scene often chose that minimum without which life in society could not effectively function. As they considered the problem, their thinking tended to center on three general areas: (1) education for ordinary living, (2) education for moral adequacy, and (3) education for the intelligent and responsible exercise of citizenship.[24] Given this period when the concept of the school's reaching the whole community (a school which would finally be capable of extending its influence to all the children of the commonwealth), what was to be offered? What would be its influence on the youth? What subjects were to be taught? When the educators of this period wanted a school to deal with a particular subject area, it was always regarded as a matter of the teacher teaching a given body of material to the student, and the student learning this material. Although there was much discussion about the cultivation of certain desirable attitudes, the means of cultivation always involved a certain body of content, the mastery of which would give rise to the desired values of the student.[25]

Although there was disagreement on exactly what education was necessary for living, the conclusions of the reformers usually revolved around the common branches---the tools of reading, writing, spelling, arithmetic, and then perhaps some geography, history, and grammar.[26] There was also debate on what would happen to citizens who learned the value and power of knowledge. If citizenry recognized that knowledge was power, it was inevitable that the ethical use of this newly found power would become a prime concern of those who bestow it. Thus "...intellectual education alone," inveighed E. W.

Robinson before the American Institute of Instruction, "will not lead men in the way of virtue. The best mental endowments, the highest cultivation, and the most polished manners have been often connected with loose morals, a bad temper, and dissipated habits."[27]

Conflict in what should be the structure and purpose of American education and who should control those functions has always been evident. Contrasting theories have always competed for the control of the educational system, although there is danger in over simplifying. But inherent in the conflict of American schools are such opposites as "individual vs. society," "freedom vs. discipline," "interest vs. effort," "play vs. work," or to use other expressions, "immediate needs vs. remote goals," "personal experience vs. race experience," "psychological organization vs. logical organization," "pupil-initiative vs. teacher-initiative." The fundamental dualism has persisted through the years.

Progressive reformers among the schools were evident even in the early education of Greeks during the Age of the Sophists. Their presence was reflected in the educational changes brought about by Italian educational theory, the adherents of which even at the time styled themselves the "Progressives." It was explicit in the successive educational reforms proposed by Rousseau, Pestalozzi, Froebel (with the introduction of the kindergarten school to the elementary school) and Herbart. In American education the dualism was reflected in the theories advocated and practiced by Bronson Alcott, in the work of Horace Mann, and later in the work of E. W. Sheldon and Francis W. Parker. They were followed by John Dewey who came into prominence in the later years of the 19th century.[28] The progressives believed the organizing and developing force in the child's experience is the child's active thinking, and thinking is stimulated by the problematic,

cognitive conflict.[29] Educative experience makes the child think--think in ways which organize both cognition and emotion. Dewey wrote "The belief that all genuine education comes about through experience does not mean that all experiences are g .uinely or equally educative. Experience and education cannot be directly equated to each other."[30]

Educational reformers in the progressive movement in the 1890's were disturbed by the "rote" memory work in the schools, where sufficient concern was not given to the emotional development of the child. Also, social reformers, humanitarians, and philanthropists respectively were indignant about the endless memory work that had marked the schools of the century. They argued the schools were too intellectualistic--they were concerned largely with numbers and words--and not with the students themselves. "They felt that schools should be alive, interesting, exciting, practical, and useful."[31]

Progressives assumed that cognitive development is a necessary though not a sufficient condition for moral development.[32] All sorts of plans were devised to loosen the formal curriculum and give it life and vitality--units, projects, activities, excursions and visits,handicrafts, gardens, laboratories, audio-visual aids and anything to offset the slavish drill on textbook and notebook. Dewey held that intelligence is a process, procedure, or function, that may operate upon all subject matter. Mind, thought, or intelligence "is an adjective (better still, an adverb)." It is that behavior or activity of the human organism in which a desired future is used to organize things."[33] The progressives pointed out "that moral development arises from social interaction in situations of social conflict. Morality...it is justice, the reciprocity between the individual and others in the social environment."[34] To Dewey, the school's role "as an independent

agency, ...could become the pivotal institution in our society for the cultivation of pertinent values giving substance to the democratic life."[35]

This progressive era "proclaimed a number of innovations that greatly expanded our perception of what the democratic life was and how the now lusty public educational system might implement these new values."[36] This progressive theory in the school curriculum remained in effect until the 1940's and 1950's when a tightening of curriculum discipline and concentration on intellectual studies began.

The changing eras of school history from colonial America, through the period of cultural transmission, through the progressive period have each left a lasting influence on students and society. Society hasn not been content to leave the schools to function without the watchful eye of the community, the state, the national government or even the courts. Each of those organizations has left considerable influence in no small way in many instances. For example, some theorists have argued that discipline disappeared in the schools during the past 100 years. Progressives helped change some of the viewpoints about students. Many theorists argue that discipline should be removed from the vocabulary of many schools and in its place they suggest teachers, "enthrone the right even of the immature learner to choose what he shall learn."[37] But in general the judiciary has rejected this theory. For example, various courts have ruled that schools may (1) set the tone and punishment of students,[38] (2) decide whether students may join fraternities,[39] (3) determine whether students can react against school administration,[40] (4) decide who should receive an education,[41] (5) encourage diversity,[42] and (6) set the moral tone.[43]

In the thirty-six years from 1928-1964, the Supreme Court made five times as many decisions involving education as it had made in the previous

139 years of its existence. Most of these decisions dealt with problems involving religion,[44] race,[45] or loyalty.[46] Generally the conflict in schools has centered around the debates of who shall decide what pupils will be taught, how they shall be taught and which goals will be met.[47] From Horace Mann on, educators insisted that education might be used to cure everything from juvenile delinquency, religious bigotry, and racial prejudice to economic depression and poverty.[48] The concept of democracy was rooted in a philosophical context that involved new assumptions concerning human nature, scientific thought, intelligence, and community and social life.[49] Within this pluralistic society changes have resulted through technological changes, growth of organizational and corporate structure, the significant increase in our material standard of living, the expansion of governmental and charitable institutions, the threat of nuclear war and the seemingly uncontrolled population explosion. These factors have outrun all prior philosophical systems that purport to man a structure of ideas through which he can organize intellectually his social experience.[50]

The leadership of education and the schools have meekly accepted the patterns and priorities of the dominant social forces. Some writers, such as Rodman,[51] Lieberman,[52] Conant,[53] and Rickover[54] wrote extensively about the problems of modern schools. Lieberman suggested "schools...reflect what is going on outside their walls as they become more interested in agreeing to what society wants rather than being concerned with values, as they once were."[55] In Education and the New America, two educational philosophers recommend that we drop the image of an individualistic America and conform to the needs of the corporate society.[56] Schools have taken on the trappings of giant corporations, bureaucracies, which hinder learning. Rhea Buford sums up these arguments:

> In virtually every important respect the behaviors appropriate to all bureaucracies are quite opposite of those appropriate to education. Educational relationships are diffuse, the student is treated as a "whole" person, but the hallmark of the bureaucratic institution is its specificity; education best proceeds in personal settings, through "primary" contacts, but bureaucracies are formal and impersonal. . . education is responsive to the needs of the student, instruction is "individualized," but bureaucracies are first, and always, agencies of control.[57]

Thus, schools the organization of schools and the values which underlie them teach students to be passive receptacle of knowledge rather than active participants in the learning process. As Edward Hall, an American anthropologist, has observed: ". . . school life is an excellent preparation for understanding adult bureaucracies; it is designed less for learning than for teaching you who's boss and how bosses behave, and (for) keeping order."[58]

In the final analysis, schools reflect the demands and cultural development of society. As such they do not exist by themselves apart from societal changes, influences or expectations. Since the nation has matured, changed direction and expectations, schools must hurry to remain in contact with those developments. Schools pass on the values and preferences that motivate society.

III. Judicial Recognition of Educational Ideology: An Accommodation Between Cultural Transmission and Progressivism

The recognition of an educational ideology by the American judiciary is a Twentieth Century phenomenon.[59] The ideology which has emerged can best be described as a "hybrid" of the cultural transmission philosophy and the progressivism of John Dewey. The courts have not seriously challenged the proposition that public schools have a duty to contribute to the improvement of the moral and psychological development of their young charges.[60] The

Supreme Court noted this responsibility in its landmark desegregation case of Brown v. Board of Education:[61]

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[62]

Various courts have viewed public schools as instruments for instilling "democratic values,"[63] as well as a force in "shaping the student's emotional and psychological make-up."[64] Indeed, some courts have considered moral training as more important than the teaching of knowledge or skills. As one state judge noted in a 1937 opinion:[65]

> The schools, whose function frequently is thought of solely in material terms, have a far greater responsibility. They must aid parents, not simply in the training of their children for the trades and professions, . . . but, rather the training and development of men and women of character. . . .
>
> . . . education is no longer concerned merely with the acquisition of facts; the instilling of worthy habits, attitudes, appreciations, and skills is far more important than mere imprinting of subject-matter. A primary objective of education to-day is the development of character and good citizenship.[66]

The educational ideology which has been developed by the American judiciary clearly embraces the philosophy that "teaching is never value-neutral, that texts, teachers, subject matter and atmosphere convey messages about approved and rewarded values and ideas."[67]

But in balancing the state's interest in cultural transmission of shared values against the individual's need for self-expression and growth the courts have also recognized that there are limits to the indoctrination process of public schools,[68] especially where fundamental constitutional liberties are involved. This "balancing" of competing interests has resulted in some difficult compromises. As one legal scholar has noted:

> The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks. Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society.[69]

The Supreme Court has been at the forefront of the development of a judicially recognized educational philosophy. The Court's reluctant intrusion into the field of education was really an outgrowth of a revolution in constitutional philosophy which characterized post-Civil War America. During the early days of the young republic -- when the United States was primarily an agrarian society -- the Supreme Court exercised great restraint in reviewing acts of Congress and the state legislatures.[70] The Constitution, including the Bill of Rights, provided little direct authority for judicial review of state activities,[71] including public education, unless a state law conflicted with some specific constitutional provision.[72] However, prior to the Civil War the Court began to display some interest in restricting state legislation, especially when it conflicted with public policy and federal governmental authority as outlined in the Constitution.[73] This practice of reviewing the "substance" of legislation to determine whether it violated some vested constitutional or natural right became known as "substantive due process."[74]

The industrial revolution of the latter half of the Nineteenth Century had a profound impact on the expansion of judicial review. The rapid growth in transportation, communication and urbanization led many states to attempt to regulate the excesses of an increasingly complex society. The laissez-faire oriented business community sought judicial review of these laws. The Supreme Court was at first reluctant to overturn such legislative enactments,[75] but as a plethora of cases began to confront the judiciary, the Court began to rely increasingly upon substantive due process to control the

legislative power of states.[76]

Thus, by the early part of the Twentieth Century substantive due process characterized the constitutional decision-making of an increasingly activist Supreme Court. It was within this framework that the Court first recognized limitations on the traditional cultural transmission ideology of public education. Many states had reacted to the massive European immigration in the 1890's by attempting to utilize the public schools to "socialize" these foreigners into American society by producing an educational "melting pot." But in 1923 the Supreme Court overturned a Nebraska statute prohibiting the teaching of foreign languages in public or private schools below the eighth grade.[77] The statute was predicated upon the traditional values transmission ideology, reflected in the notion that those who learn a foreign language too soon "must always think in the language, and, as a consequence, (this will) naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."[78] The Court rejected the Platonic model of education and warned educators that they should not attempt to go too far in their efforts "to submerge the individual and develop ideal citizens."[79]

Two years later, in Pierce v. Society of Sisters,[80] the Court invalidated an Oregon law which required all children to attend public schools. In holding that parents are free to supervise their children's education,[81] the Pierce Court questioned the cultural transmission theory on the grounds that there is no "general power of the State to standardize its children."[82]

By the 1930's the Court had begun a retreat from its substantive due process philosophy.[83] This was gradually replaced by a two-tier approach to constitutional questions. In cases involving state statutes -- particularly economic legislation -- which did not implicate "basic" or fundamental

constitutional liberties, the Court began to defer to state legislatures if there appeared to be a "rational basis" for such laws. On matters of fundamental liberties, such as those outlined in the First Amendment, the Court applied a theory of strict scrutiny.[84] Legislation which abridged such rights would be "presumed" unconstitutional and thus subjected to "strict scrutiny" by the Court, unless the state could show some compelling state interest in restricting such rights.

As the Court was struggling with the parameters of this two-tier approach, it became clear that this novel construction of constitutional decision-making was ill-suited to the educational environment. Since education is not mentioned in the Constitution, states and local communities had always exerted substantial control over public schools. In addition, the states had always assumed greater responsibility for the affairs of minors than the adult population,[85] and it could be argued that the cultural transmission ideology was predicated upon a "rational relationship" (i.e., the lower standard of constitutional review described above) between a legitimate state interest in moral education and legislative limitations on individual expression within the educational environment. On the other hand, the "strict scrutiny" to which legislation restricting basic liberties was subjected posed the question of how much freedom should be tolerated within the public academy.

This paradox was addressed by the Court in 1943 in West Virginia Board of Education v. Barnette.[86] In Barnette the Court overturned on First Amendment grounds a West Virginia statute which mandated that all public school children salute the American flag. But in striking down this law the Court both approved and disapproved of the state's interest in the transmission of shared values. In one instance the Court acknowledged that

the state may require the teaching of historical values which "tend to inspire patriotism and love of country."[87] But then the Court noted:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.[88]

In Barnette the Court approved of the cultural transmission ideology in a general sense but did not state imposed measures designed to coerce certain beliefs. While there appears to be some inconsistencies in this approach, one commentator has attempted to reconcile the "indoctrinative" and the "individualistic" aspects of the Barnette decision:

> The two aspects, however, need not be inconsistent. Cultivating appreciation for the meaning of the flag and the Constitution not only serves the broad inculcative goals of preparing children for citizenship and transmitting basic cultural values, but also exposes students to diverse views and requires them to think critically. The prohibition against coercion prevents the children's mindless memorization of less consensual topics. Although recognizing the dual nature of public schools, the Court simply drew a general boundary beyond which indoctrinative efforts are impermissible rather than define permissible indoctrinative goals or methods in an ideologically consistent framework of education.[89]

Thus, the Supreme Court, in its early educational opinions in the 1920's and the Barnette decision in 1943, did not fully reject the cultural transmission theory, but it failed to define precisely the conditions under which progressivism must prevail.[90]

Although the Court did not explicitly embrace the progressivist ideology until the late 1960's, the seeds of the judicial recognition of this philosophy can be found in the "loyalty oath" cases of the 1950's and 1960's. For example, in Wieman v. Updegraff,[91] in voting to overturn an Oklahoma law requiring state employees to take a "loyalty oath" disavowing membership in any "communist front" or "subversive" organization, Justice Frankfurter, in a concurring opinion, noted:

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.[92]

A similar conclusion was reached in a 1960 decision involving an Arkansas statute.[93]

The watershed case for the progressivist ideology was the Tinker decision in 1969.[94] In Tinker three students were suspended from public schools in Des Moines for wearing black armbands to protest the Vietnam War. The students were accused of violating a policy against continuing to wear the armbands after a request to remove them. The students sued the school district for violating their constitutional rights to free expression. In a seven to two decision, the Supreme Court held the regulation to be unconstitutional. The majority opinion, in an often quoted endorsement of the students' rights to free expression, stated that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[95] Such constitutionally protected activities could not be restrained, the Court held, unless such conduct would "materially and substantially interfere with the appropriate discipline in the operation of the school."[96]

The Tinker Court's opinion is replete with language reflective of John Dewey's progressivist philosophy of education. The Court did not even attempt to reach an accommodation between the cultural transmission ideology and the speech interests of the students. Instead, the majority opinion viewed the protection of student speech as important because of its educational value:[97] "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students."[98] The Court also described the classroom as a "marketplace of

ideas,"[99] an invitation to school authorities to encourage students to participate in the learning process.[100] This is a further indication that the Court had adopted the progressivist ideology as the cornerstone for its opinion concerning the constitutional rights of public school students.

The Tinker decision, however, was not devoid of the cultural transmission ideology. In a dissenting opinion, Justice Black supported the cultural transmission theory implemented by local school officials and rejected the permissiveness which was an outgrowth of the student rebellion of the 1960's: ". . . if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[101] According to Justice Black, student speech is unimportant to the educational process because that process consists primarily of the "passive intake of knowledge by immature children":[102]

> . . . public school students (are not) sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen and not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.[103]

Despite the majority opinion's enthusiastic endorsement of progressivism, in retrospect the Court did not completely abandon the cultural transmission interests of the public schools. For example, the Court still recognized local control and the state's power to prescribe the curriculum and to hire teachers.[104] The Court left little doubt that the foundation of the students' constitutional rights outlined in Tinker was the progressive model for public education.

The Tinker decision was also instrumental in expanding the rights of the high school press during the 1970's. Encouraged by the "decade of dissent" of the 1960's, student editors increasingly sought judicial protection of their First Amendment rights rather than submit to arbitrary administrative censorship. Although lower federal courts differed on the scope of protection to be accorded the student press,[105] most of these decisions were unmistakenly in the direction of greater constitutional protection for high school newspapers. But the absence of a definitive Supreme Court decision on the extent of First Amendment protection for school-sponsored publications left in doubt the parameters of the progressivism of Tinker as it pertained to the scholastic press.

Shortly after the 1969 Tinker decision the makeup of the Supreme Court changed dramatically, and the Court began a slow retreat from its progressive model of public education. The first doubts were raised in 1975 in Goss v. Lopez.[106] In a five to four decision the Court extended due process protections to public school suspension cases and upheld the rights of students to participate in the disciplinary proceedings in order to respond to the charges. Although the majority adhered to the progressivist model, the four dissenting justices relied upon the cultural transmission philosophy in observing that "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults."[107] The cultural transmission model was acutely reflected in Justice Powell's dissent advocating judicial deference to the authority of local school officials:

> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing

> role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools.[108]

In 1979 in Ambach v. Norwick[109] the Court explicitly embraced the cultural transmission model. Ambach upheld a New York law forbidding certification of a public school teacher who had not expressed an intention to apply for citizenship. Justice Powell, in writing for the Court, recognized the "importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests. . . ."[110] The majority opinion was devoid of progressivist language and concentrated, instead, on the role of the public schools in the preservation of basic values predicated upon the cultural transmission model.

In 1982 in Plyler v. Doe[111] the Court invalidated a Texas law denying free public education to children of illegal aliens. In a footnote the Court reinforced its reasoning in Ambach by describing the public schools as "an important socializing institution, imparting those shared values through which social order and stability are maintained."[112] In recognizing the fundamental role education has in "maintaining the fabric of our society,"[113] the Court noted that it "cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[114]

Neither Ambach nor Phyler concerned directly the issue of suppression of student ideas or expression, although both specifically embraced the cultural transmission philosophy. But in Board of Education v. Pico[115] the Supreme Court confronted, for the first time since Tinker, the question of suppression of ideas in the public school environment. In Pico several New York high school students challenged a school board's decision to remove certain "objectionable" books from its schools' libraries. The Court divided

sharply on the question and issued no majority opinion. The plurality opinion, authored by Justice Brennan, held that the First Amendment imposes limitations upon a local board's exercise of its discretion to remove books from school libraries.[116] The plurality based their decision, in part, upon the "right to receive information and ideas."[117] But despite the rather inconclusive nature of the decision and the plurality's sensitivity to First Amendment values, every justice embraced, to some extent, the cultural transmission ideology.[118] For example, Justice Brennan stated that public schools are vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."[119] Justice Blackmun observed that it is entirely appropriate to use public schools to teach fundamental values "necessary to the maintenance of a democratic political system."[120] And Justice Rehnquist, in his dissent, stated that when government "acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge."[121]

Pico can best be described as an attempt to accommodate the cultural transmission ideology with the progressive notion of the "right to receive information and ideas." It was a constitutional balancing act between the socialization process within the public schools and the First Amendment's prohibition of "prescriptions of orthodoxy."[122]

In 1986 the Court rendered its decision in Bethel School District No. 403 v. Fraser,[123] which marked a "renewed emphasis on the cultural transmission ideology and perhaps the end to the Court's limited acceptance of the progressive ideology."[124] In Frazer the Court upheld disciplinary action[124] against Mathew Frazer, a high school student, for using an explicit sexual reference in a speech delivered during a student assembly.

Chief Justice Burger, in writing for the Court, embraced the cultural

transmission model when he recognized as a "highly appropriate function of public school education" the prohibition of "the use of vulgar and offensive terms in public discourse."[125] The majority opinion noted that the constitutional rights of students in public schools are not automatically "coextensive with the rights of adults in other settings."[126] Justice Burger also observed that the inculcation of basic values is truly the "work of the schools" and that nothing in the constitution "prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[127] The Chief Justice acknowledged the importance of exposure to divergent political and religious views but suggested that, in the educational environment, these interests must sometimes be subordinated to the inculcation of commonly shared values and modes of behavior:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching the students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[128]

The Frazer majority also felt that permitting an indecent or vulgar speech would be tantamount to relinquishing control of the school to the students.[129] Secondary students, the Court reasoned, are not "sufficiently mature to engage in an extensive self-governing system."[130] Thus, the Court clearly recognized the primacy of discipline as an educational goal and retreated from Dewey's progressivist model of student participation and interaction.

The Supreme Court's repudiation of the expansive application given to Tinker through its progeny of high school press cases was manifested earlier this year in Hazelwood School District v. Kuhlmeier.[131] This case concerned the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's

journalism curriculum.[132]

The controversy began in the spring of 1983 when the principal of Hazelwood East High School in St. Louis objected to two stories which were scheduled for publication in Spectrum, the student newspaper. One described three students' experiences with pregnancy; the other discussed the impact of divorce on students at the school. The principal was concerned that, although the pregnancy story used "false" names to mask the identity of the interviewees, the pregnant girls might still be identifiable from the text. He also believed that the article's references to sexual activity and birth control might be inappropriate for some of the younger students. In addition, the principal felt that the parents of a student mentioned by name in the divorce story should have been given an opportunity prior to publication to respond to critical remarks about the parents. He believed that there was insufficient time to make the necessary changes in the stories before the press run and ordered the stories deleted.[133]

Several staff members then sued the school district and officials in federal district court, seeking a declaration that their First Amendment rights had been violated, injunctive relief and monetary damages. The district court denied an injunction and ruled that no First Amendment violation had occurred.[134] However, the Court of Appeals for the Eighth Circuit, relying upon Tinker, reversed on the grounds that the high school newspaper was not a "public forum" because it was "intended to be and operated as a conduit for students' viewpoints."[135] The Court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "necessary to avoid material and substantial interference with school work or discipline. . . or the rights of others."[136]

The Supreme Court granted certiorari[137] and in early 1988 reversed the Eight Circuit in a five to three decision. The Court rejected the appellate court's characterization of Spectrum as a "public forum" because the school had not opened the newspaper for "indiscriminate use by the general public" or "by some segment of the public, such as student organizations."[138] The Court's majority opinion, authored by Justice White, described Spectrum as a "school-sponsored" publication and noted that officials should have greater authority over such forums of expression because "members of the public might reasonably perceive (them) to bear the imprimatur of the school."[139] A school, in its capacity as "publisher" of the school newspaper, may exercise greater control over this medium of expression to assure that:

> participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[140]

The Court also rejected the Tinker standard of review, prohibiting school authorities from restricting expression unless they have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."[141] Instead, the Court declared, school officials were entitled to regulate the contents of Spectrum in any "reasonable manner" because the paper was intended as a "supervised learning experience for journalism students."[142] In a reaffirmation of the traditional role of school officials in determining educational goals, Justice White declared unequivocally that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns."[143] The Court, in its manifest preoccupation with high school journalism as an educational enterprise rather than a vehicle for

unrestrained student expression, repudiated the progressivist model in recognizing the role of scholastic journalism in preparing students for the environment outside of the academy:

> A school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics. . . . otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[144]

This philosophy was reflected in the school's Curriculum Guide, which noted that the lessons to be learned from the journalism course that published Spectrum included "the legal, moral, and ethical restrictions imposed upon journalists within the school community" and "responsibility and acceptance of criticism for articles of opinion."[145] According to published school policy, students were permitted to exercise some authority over the contents of Spectrum. But the Court stated that a "decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity."[146] Thus, the majority opinion reflected the traditional view that courts should defer to public school officials in the establishment of value-oriented pedagogical objectives.

Justice Brennan wrote the dissenting opinion, which was joined by Justices Marshall and Blackmun. But even Justice Brennan acknowledged the cultural transmission function of the public school when he stated that it inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system" and that "the public educator nurtures students' social and moral development of transmitting to them an official dogma of 'community values'."[147] But Brennan took the Court to task

for elevating pedagogical objectives over the students' rights of expression: "If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations . . ., converting our public schools into 'enclaves of totalitarianism'."[148] While acknowledging that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[149] Brennan also criticized the majority for abandoning Tinker:

> The educator may, under Tinker, constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrupt" the newspaper's curricular purpose.
>
> The same cannot be said of official censorship designed to shield the audience or dissociate the sponsor from the expression. Censorship so motivated might well serve . . . some other school purpose. But it in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors.[150]

The dissenters considered it ironic that the Court had opened its analysis by appearing to reaffirm Tinker's proposition that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[151] and then had proceeded to denude high school students of much of the First Amendment protection that Tinker had prescribed.[152] It is clear that the Court struggled to avoid overturning Tinker, while at the same time reestablishing the significant role of the public schools in the teaching of fundamental morals and values.

IV. Rationales For A "Limited Capacity" Free Expression Right In the Public Schools

Now that the initial emotional reactions to the Hazelwood decision have abated somewhat, it is time to review dispassionately the Supreme Court's

apparent rejection of the progressivist model of free expression in the public schools and the return to the cultural transmission ideology. Constitutional decisions are not made in a vacuum, and the conservative majority in Hazelwood reflected a "back to basics" mood which has permeated public opinion for several years. Is the return to the cultural transmission philosophy as reflected in Fraser and Hazelwood predicated upon principles of sound public policy? The authors believe that it is and advocate a "limited capacity" free speech right within the public schools. A "limited capacity" right is one which exists for the student as an individual citizen but which must give way to the authority of school officials when there is reason to believe that the exercise of that right will interfere with educational objectives. The authors predicate their position on the following rationales:

1. The underlying values of free speech are not as important in the public schools as society at large.

Although various authors have identified a variety of values underlying speech, Emerson has provided the most expansive view of free expression. Emerson groups these values into four broad categories: (1) assurance of self-fulfillment; (2) attainment of the truth; (3) assurance of participation by the members of the society in social, including political, decisionmaking; and (4) maintenance of the balance between stability and change in the society.[153]

Concerning the notion of self-fulfillment, Emerson states that "expression is an integral part of the development of ideas, of mental exploration and the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend this far if the whole nature of man is not be thwarted."[154] In essence, Emerson is advocating a form of individual autonomy. But there are at least three

arguments opposed to the idea that autonomy is a necessary trait for minors within the public school setting. First of all, the exercise of intellectual autonomy presupposes the development of a mature mind. It is doubtful whether immature individuals have the capacity to exercise fully the responsibilities of citizenship.

Another argument against individual autonomy in the public schools is that the right of unrestrained self-expression is not a necessary condition for growth and maturity. One commentator has noted that limitations on autonomy through restrictions on self-expression do not necessarily "stifle" the child's development:

> The availability of an option of intramural dissent or insurgency simply is not a necessary inference from an assumed value of individuality or distinctiveness. A child can be "different" or "unique" in respects chosen by the child, and can display those qualities, on all or selected occasions, even if the classroom agenda-sharing is foreclosed to the student. . . . Autonomy does not necessarily require a particularly broad ranging education, or exposure to a nearly infinite set of ideas, or the ability to think constructively within all such areas.[155]

Finally, the very notion of autonomy for minors is questionable, since they are still subject to parental influence. The views of students are often influenced by their "highly motivated parents,"[156] and a large body of legal precedent has recognized the nexus of parental interest and state interests in promoting the child's moral development. "The state's authority to discourage children's expression derives from the child's need for parental direction and the state's interest in educating future citizens."[157] The recent cases dealing with the authority of the state to regulate children's exposure to obscenity and vulgarity clearly reflect the judiciary's concern with the child's need for parental direction.[158] And schools must sometimes act in loco parentis and thereby assume some degree of responsibility for the moral training of its students, even if that means "channeling" their thought

processes. Thus, the right of access to a diversity of information and ideas -- a corollary of the rights of free speech recognized in society at large[159] -- can be curtailed within the secondary school environment.

Emerson's second category of free speech value -- the attainment of truth -- is also questionable within the public schools. Truth detection presupposes a body of knowledge, some skill at analytical reasoning and a well-developed value system. But children tend to "not be at the cutting edge of truth or insight. . . ."[160] In order to acquire these traits students' interests in free expression must sometimes be subordinated to pedagogical objectives. This is particularly true in the case of the high school newspaper, since the paper is not merely a forum for self-expression. The subject matter, like that censored in the Hazelwood case, often impacts upon the lives of other students. The primary gatekeepers -- the reporters and editors -- are themselves minors whose journalism skills and ethical judgments are in their infancy. There is no more of a reason to assume that student journalists should not submit their curriculum-based activities to the advice and teaching of school authorities than the students in other classes, e.g. math, history and geography.

Emerson also sees the right of free expression as the key to democratic self-government and participation in the process. Few would question the "political aim" of the educational process in the preparation of society for collective self-government. The rights of minors within the school environment are different from those granted adults. Some of them, such as free expression, are "future-oriented in the sense that they have real meaning and use once the child reaches maturity."[161] In addition, for teenagers non-school experiences, including communicating with their peers, are often as instrumental as those broad free speech rights referred to in

Tinker.[162] In any event, "the ability of the child to influence the actions of the state through the political processes and to reshape his own life as a result of information obtained through the first amendment is severely limited."[163]

Finally, Emerson says that free speech has value in maintaining the balance between stability and change in society.[164] This principle has little application within the public school because the cultural transmission ideology itself is a stabilizing influence. If one accepts the public academy's role in the reinforcing of the dominant fundamental societal values -- values which may change over time -- then one must conclude that the subordination of free expression, within certain contexts (e.g., scholastic journalism), is sometimes essential to insure that the schools perform as institutions of both stability and change.

2. Some control of the high school press is essential to maintain academic standards.

The curriculum-based high school paper poses certain pedagogical problems that extend beyond the general free speech rights of students. More importantly than the notion that the school newspaper is a medium of expression is the fact that it is also a training vehicle for young journalists. Its educational mission is paramount; otherwise, there would be no philosophical or academic rationale for providing financial support for scholastic journalism. As with any other subject, school authorities must be able to establish high standards.[165] The instructor must be able not only to correct the "mechanics" of the copy submitted, e.g. grammar, spelling and writing style,[166] but must also impart the "standards" of professional journalism. Within the high school environment this may, occasionally, necessitate the deletion of material which is vulgar or profane, impinges on

the rights of others, or is "unsuitable for immature audiences."[167] Otherwise, the schools will be remiss in preparing high school journalists for later professional training. Since the school is the "publisher" of the paper, the principal must exercise some content control. For the Supreme Court to have ruled differently would have given student editors more freedom than that enjoyed by professional editors.

3. Decisions regarding high school publications should be based upon local educational objectives rather than a national constitutional standard.

The progressivist approach of the Tinker Court suggested that the values taught in local educational systems could be measured by a national constitutional standard.[168] But this ignores the history of American public education as a predominantly local institution.[169] As legal commentator David Diamond has observed:

> The widespread local responsibility and local control of public education throughout the history of the United States suggest that, insofar as public schools are value inculcators for creating the proper citizen for the community, the community has been defined as a local one. Furthermore, the needs of that community are best perceived locally.[170]

This tradition of localism is reflected in the reality that substantial discretion has been accorded local school boards and administrators in the operation of public schools.[171] Although local school boards are often elected, it is generally believed that local boards will preserve the best interests of the schools, students and community "in terms of the tasks of education. . . ."[172] In addition, local school authorities are in the best position to respond to the diverse and often unpredictable behavior patterns and modes of expression of teenagers confined for several hours a day in a public school environment. National constitutional standards are not responsive to the realities of the public academy. For example, the Tinker standard that school authorities should not restrict expression unless it

will "substantially interfere with the work of students" dissolves into meaningless rhetoric when applied to specific situations. It is possible that articles like the ones deleted from Spectrum might cause "distractions" in classes, which could "substantially interfere with the work of the school" even if they are not physically disruptive. The principal at Hazelwood could reasonably have believed that the articles on pregnancy and divorce might have treaded upon the interests of other students and their parents.

There is ample judicial precedent for preferring local community standards over a national constitutional standard. For example, in Hortonville Joint School District v. Hortonville Education Association[173] the Supreme Court rejected the "due process" claims of fired public school teachers who were on strike. The teachers claimed that the state's failure to provide for judicial review of the proceedings constituted a denial of due process. But the Court, in rejecting the teachers' claims, noted that the school board's dismissal of the striking teachers was an exercise of its policy prerogatives in order to "best serve the interests of the school system . . . and the interests of the citizens whose taxes support it."[174] In other words, the board was answerable, not to the judiciary, but to the electorate.

The courts have also expressly adopted the local "contemporary community standards" approach in some areas of First Amendment litigation, e.g. obscenity.[175] Thus, while it would be unreasonable to abandon all constitutional rights to the vagaries of local authority, sound public policy requires that the extent of constitutional protection in some areas be measured by the local community standard. This is what the Hazelwood Court had in mind when it stated that a school may repress speech that is not inconsistent with its basic educational mission, even though such expression

would be constitutionally protected in society at large.[176]

4. The lack of maturity of high school students justifies a "limited capacity" free speech right.

The notion of a "limited capacity" free expression right in the public schools is well established in Supreme Court precedent. In both Fraser and Hazelwood the Court recognized that the First Amendment rights of students in the public schools are not identical with those of adults in the outside world.[177] The Court justified its rulings on the grounds that some speech may be inconsistent with a school's basic educational mission. But an equally compelling rationale is that the lack of emotional and intellectual maturity justifies greater limitations on adolescents within the educational environment. This view was expressed by Justice Stewart in his concurring opinion in Tinker: "(A) State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[178]

This "lack of maturity" rationale is well-grounded in Western philosophy. The writers of the European Enlightenment argued that the "natural rights" of the individual are superior to the authority of the state.[179] That philosophy was influential in the formation of the United States and its constitutional government. But these early philosophers believed that such individual "rights" should not be extended to every member of society. John Locke, a primary architect of the libertarian philosophy of individualism, noted the limited capacity of children to exercise rationally the privileges of freedom accorded them by nature:

> To turn him (the child) loose to an unrestrained liberty, before he has reason to guide him, is not allowing him the privilege of his nature to be free, but to thrust him out amongst brutes, and abandon him to a state as wretched and as much beneath that of a man as theirs.[180]

John Stuart Mill also addressed the subject in his classic, On Liberty. In embracing the philosophy of individual liberties, Mill observed that "this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood."[181] Even as women and slaves were increasingly accorded constitutional rights in the latter half of the Nineteenth Century, children were still excluded from these "theoretical formulations that gave birth and growth to democratic concepts. . . ."[182] In 1861 Sir Henry Maine observed that children "before years of discretion" do not "possess the faculty of forming a judgment on their own interests."[183]

These philosophical constructs have been influential in the development of American law regarding the role of minors within society. There is ample precedent for limiting the liberties of minors until they attain a certain age. Restrictions upon driving privileges, alcohol consumption, the right to vote and the right to enter into contracts are representative of the limited capacity rationale based upon the lack of maturity. Minor students are "not finished products, but radically undeveloped."[184] Children develop from "incapacity toward capacity."[185] This formulation has been reflected in virtually all aspects of the law involving minors. For example, the juvenile justice system is based upon the premise that "children who are yet in the developmental stages of becoming mature adults should be protected against the long term implications of their own decisions made at a time when they lack sufficient capacity and experience to be held as responsible as an adult would be for the same decision."[186]

Although the line of demarcation between immaturity and maturity is not always clear, it is not logical to attempt to differentiate by age (e.g., between 14 and 17-year-olds) within the high school walls. Graduation from

high school marks a right of passage into the outside world, and until that milestone is reached the public institution's educational objectives must be accorded substantial deference. The school-sponsored newspaper is, above all, a pedagogical instrument, a "tool" for teaching the mechanics and ethics of journalism. The fact that the reporters and editors might choose to confront controversial subjects in no way diminishes the principal's responsibility to insure that such activities do not disrupt the educational mission of the school or violate the rights of others.

5. Student journalists are not completely denied their rights of expression; there are alternative channels of communication.

Restrictions on the high school press, as reflected in the Hazelwood decision, do not completely deprive the student of his or her right to self-expression. First of all, even in light of Hazelwood the students' general free speech rights remain intact. They are free to discuss issues among themselves or, under appropriate circumstances, to express their views in class. They are even free to publish an alternative or "underground" newspaper directed at the student audience. And, of course, they may express their views outside the school environment. In other words, there are alternative channels available for expression over which school authorities have little or no control.

Secondly, the restrictions imposed by authorities on school-sponsored publications are narrow and are designed to fulfill a particular state interest.[187] They are in effect only as long as the students are involved in writing for and producing the newspaper. Since the paper is not really a public forum for student expression (i.e., the students have no "right of access" to the paper to express their views),[188] school authorities are sometimes justified in limiting the nature of the content, especially where

it might violate the rights of others who have no access to the paper to respond. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[189] In essence, school policies which restrict the output of scholastic journalism can be viewed as "valid time, place, and manner" restrictions,[190] which are narrowly tailored to a legitimate educational interest and which do not deprive the students of access to alternative forums for the expression of protected speech.

V. Conclusions

The Hazelwood decision does not represent the kind of significant constitutional retreat which some of its critics have suggested.[191] It is true that the principles outlined by the Tinker Court in 1969 have been refined. But the Hazelwood majority recognized that the Tinker decision had tested the limits of liberalism in the public schools, and the results were not promising. Thus, the Hazelwood Court's restoration of the traditional cultural transmission philosophy to its proper place and the repudiation of the progressivist ideology in the arena of student expression are based upon principles of sound public policy. This observation flows from three conclusions derived from the analysis provided in this paper.

First of all, the ideas espoused in the Hazelwood decision are historically well-grounded in libertarian philosophy and educational ideology. The liberal thinkers of the enlightenment were reluctant to extend the full privileges of political citizenship to children, and this notion found its manifestation in educational theory in the form of the cultural transmission ideology. It was through the moral and ethical instruction provided by the public schools that immature individuals were to learn about

the responsibilities of citizenship before they reached the age of majority. It is true that the judiciary has allowed, at least since the 1920's, the progressivist ideology to coexist along side that of the cultural transmission idea. But it is significant that, except perhaps in the Tinker decision, the Supreme Court has never abandoned the teaching of moral values as a primary mission of the public school. Hazelwood is a tacit admission that, where the exercise of liberty runs counter to the educational mission of the school, the latter must prevail in the interest of teaching ethical and moral standards.

Secondly, the general thrust of the Hazelwood majority opinion is compatible with a large body of legal precedent recognizing the "limited capacity" of juveniles to exercise fully the rights and privileges accorded to adults. The courts in this country have consistently recognized a legitimate state interest in applying a lower level of constitutional protection to children and adolescents, and Hazelwood is fully compatible with this approach to constitutional decision-making. Hazelwood has been criticized for its lack of "traditional" First Amendment analysis.[192] But this kind of analysis is probably unnecessary in light of the Court's determination that the rights of high school students are not "coextensive" with those of adults. The Court applied a "reasonableness" standard to the conduct of school administrators, a constitutional test which falls far short of the strict scrutiny approach applied in the outside world but which is consonant with other decisions affecting public high schools, e.g. the search of school lockers for drugs.[193]

Thirdly, at the least the Hazelwood case represents a pragmatic view of the role of scholastic journalism within the public school curriculum. High school newspapers are not public forums established to facilitate an

unfettered marketplace of ideas. These school-sponsored publications are educational tools, designed to teach journalistic knowledge, skills and ethical behavior. Administrative restraints on articles which the principal feels are in poor taste, contain objectionable material or are likely to violate the interests of third parties do not abridge the general free speech rights of student reporters and editors. They are free to seek alternative channels of communication, and they are certainly at liberty to express themselves outside the schoolhouse gates. But the high school, as the publisher of the student newspaper, retains the same rights as a commercial publisher to refuse to run objectionable material. Thus, administrators and journalism teachers must have flexibility in formulating and implementing policies regarding the ethical and legal "standards" to be incorporated into scholastic journalism instruction.

In summary, when viewed in the broad context of constitutional law Hazelwood is not a significant retreat. It is predicated upon reasonable philosophical and educational theories and principles of sound public policy. It is time to disavow the alarmist attitudes represented by such publications as Captive Voices and to return to a rule of reason within the public academy.

Endnotes

[1] For a discussion of this issue, see Betsy Levin, "Educating Youth For Citizenship: The Conflict Between Authority and Individual Rights in the Public School," 95 Yale Law Journal 1647 (1986).

[2] 393 U.S. 503 (1969).

[3] Ibid., 506.

[4] Note, "Education and the Court: The Supreme Court's Educational Ideology," 40 Vanderbilt Law Review 939, 941 (May 1987).

[5] 14 Med.L.Rptr. 2081 (1988).

[6] James A. Johnson, Harold W. Collins, Victor L. Dupuis, John H. Johansen, Foundations of American Education Readings. (Boston: Allyn and Bacon, Inc., 1969), 302.

[7] The Writings of George Washington from the Original Manuscript Sources. (John C. Fitzpatrick, ed.: Government Printing Office, Washington, D.C.., 1940), Vol. 35, p. 230.

[8] Thomas Jefferson to Colonel Charles Yancey, Jan. 6, 1816, in The Writings of Thomas Jefferson. Paul Leicester Ford, ed.: G. P. Putnam's Sons, New York, 1899), Vol. X, p. 4.

[9] Quoted from the preamble of one of the School Laws of Illinois. Common School Assistant, Vol. 1 (1836), p. 87.

[10] Tenth Annual Report of the Board of Education, Together with the Tenth Annual Report of the Secretary of the Board. (Boston: Dutton and Wentworth, 1847), p. 112.

[11] Merlee Curti, Social Thought in America. (New York: Littlefield, Adams & Company, 1959), pp. 35-40.

[12] Johnson, supra note 6 at 304.

[13] Lawrence A. Cremin. The American Common School: A Historical Conception. (New York: Bureau of Publications, Teachers College, Columbia University), p. 44.

[14] Lawrence Kohlberg and Rochelle Mayer, Harvard Education Review, Vol. 42, No. 4, November 1972, p. 453.

[15] Cremin, supra note 13 at 48.

[16] In Horace Kallen, Culture and Democracy in the United States. (New York: Boni & Liveright, 1924), p. 138.

[17] Henry Pratt Fairchild, The Melting Pot Mistake. (Boston: Little, Brown and Company, 1926), pp. 260-261.

[18]Percey Stickney Grant,"American Ideals and Race Mixture," in 195 North American Review, 513-515 (1912).

[19]Free Inquirer, Vol. 2, No. 2, Nov. 7, 1829, p. 14.

[20]James Madison to W. T. Barry, August 4, 1822, in the Writings of James Madison. (Gallard Hunt, ed. New York: G. P. Putnam's Sons, 1910), Vol. IX, p. 103.

[21]Johnson, supra note 6 at 306

[22]Charles Fenton Mercer, A Discourse on Popular Education. Princeton, Sept. 26, 1926, pp. 16-18, 21.

[23]Johnson, supra note 6 at 367.

[24]Cremin, supra note 13 at 63.

[25]Ibid., 62.

[26]Daniel Kimball, "Oh the Duties of Female Teachers of Common Schools," in The Lectures Delivered Before the American Institute of Instruction at Springfield, Mass., August 1959, p. 21.

[27] E. W. Robinson, "Moral Culture Essential to Intellectual Education," in The Lectures Delivered Before the American Institute of Instruction, at Boston, August, 1841, p. 122.

[28]See John Dewey, Experience and Education, pp. 5-20.

[29]Kohlberg, supra note 14 at 454.

[30]Dewey, supra note 28.

[31]Johnson, supra note 6 at 317.

[32]Kohlberg supra note 14 at 455.

[33]Quoted in Johnson, supra note 6 at 382.

[34]Kohlberg, supra note 14 at 455.

[35]John Dewey, Democracy and Education. (New York: Macmillan Company, 1961), pp. 238ff.

[36]Seymour W. Itskoff, Cultural Pluralism and American Education. (Scranton, PA: International Textbook Company, 1969), p. 11.

[37]Johnson, supra note 6 at 367.

[38]Ferrell v. Dallas Independent School District, 261 F.Supp. 545 (N.D. Tex., 1966), aff'd 392 F.2d 706 (5th Cir., 1968), cert den. 393 U.S. 924.

[39]Burkitt v. School District No. 1, 246 P.2d 565 (Oregon 1952).

[40] Wooster v. Sunderland, 27 Cal.App. 51, 148 (1915).

[41] Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954).

[42] Myers v. Arcata Union High School District. Unreported decision quoted in American Civil Liberties Union, Academic Freedom in the Secondary Schools.

[43] In state exc. rel. Beaty v. Randall, 79 Mo.App. 226 (1899).

[44] Dormus v. Board of Education, 342 U.S. 429 (1952).

[45] Plessy v. Ferguson, 163 U.S. 537 (1896).

[46] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

[47] Johnson, supra note 6 at 357.

[48] Clarence J. Karier, The Individual, Society, and Education: A History of American Educational Ideas, 2nd. ed. (Urbana and Chicago: University of Illinois Press, 1986), p. 367.

[49] Itskoff, supra note 36 at 11.

[50] Ibid., 12.

[51] Rodman B. Webb, Schooling and Society (New York: Macmillan Publishing Co., Inc., 1981), p. 273.

[52] Myron Lieberman, The Future of Public Education (Chicago: University of Chicago Press, 1960), p. 15.

[53] James Conant, Slums and Suburbs (New York: McGraw-Hill Book Company, 1961).

[54] Hyman G. Rickover, Education and Freedom (New York: Dutton & Co., Inc., 1957).

[55] Lieberman, supra note 52 at 15.

[56] Solon Kimball and James McClellan, Education and the New America (New York: Random House, Inc., 1962).

[57] Rhea Buford, "Institutional Paternalism in the High School," 34 Urban Review, 13-15.

[58] Edward T. Hall, Beyond Culture (New York: Doubleday & Co., Inc., 1977), p. 105.

[59] For a complete discussion of this issue, see Note, supra note 4.

[60] Joel S. Moskowitz, "The Making of the Moral Child: Legal Implications of Values Education," 6 Pepperdine Law Review 105, 107 (1978).

[61] 347 U.S. 483 (1954).

[62] Ibid., 493 (emphasis added).

[63] E.g., see Serrano v. Priest, 487 P.2d 1241, 1259 (1971); Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., Concurring); McCollum v. Board of Education, 333 U.S. 203, 216 (1948).

[64] Hobson v. Hansen, 269 F.Supp. 401, 483 (D.D.C. 1967), aff'd sub. nom., Smuck v. Hobson, 408 F.2d 175 (C.A.D.C., 1969).

[65] Stephens v. Bongart, 189 A. 131 (Juvenile and Domestic Relations Court of New Jersey, Essex County, 1937).

[66] Ibid., 137.

[67] Stephen Arons and Charles Lawrence III, "The Manipulation of Consciousness: A First Amendment Critique of Schooling," 15 Harvard Civil Rights-Civil Liberties Law Review 309, 317 (Fall 1980).

[68] E.g., see Tinker v. Des Moines Independent Community School District, supra note 2; West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923).

[69] Betsy Levin, "Educating Youth For Citizenship: The Conflict Between Authority and Individual Rights In the Public School," 95 The Yale Law Journal 1647, 1639 (July 1986).

[70] In fact, the Court held only two federal laws unconstitutional prior to the Civil War. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[71] See John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Constitutional Law. 2d ed. (St. Paul, Minn.: West Publishing Co., 1983), p. 427.

[72] E.g., see U.S. Const., Art. 1, sec. 10, which limits the ability of state governments to take certain specific actions or to take other actions without the consent of Congress.

[73] E.g., the Court used the commerce clause to overturn state legislation that would "interfere unreasonably with the free flow of commerce between the states." Nowak, supra note 71 at 429. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 207 (1824).

[74] For a discussion of the development of substantive due process, see Nowak, supra note 71 at 425-96.

[75] Ibid., 434.

[76] E.g., see Munn v. Illinois, 94 U.S. 113 (1877); Railroad Commission Cases, 116 U.S. 307 (1886); Mugler v. Kansas, 123 U.S. 623 (1887); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905).

[77]Meyer v. Nebraska, supra note 68.

[78]Ibid., 398.

[79]Ibid., 402. See Moskowitz, supra note 60.

[80]268 U.S. 510 (1925).

[81]Ibid., 534-5.

[82]Ibid., 535.

[83]E.g., see West Coast Hotel v. Parish, 300 U.S. 379 (1937); United States v. Carolene Products Co., 304 U.S. 144 (1938).

[84]E.g., see United States v. Carolene Products Co., supra note 83 at 152-3, n. 4.

[85]42 Am Jur 2d sec. 8 (1969).

[86]Supra note 68.

[87]Ibid., 631 quoting Minersville School District v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

[88]Ibid., 641-2.

[89]Supra note 4 at 952.

[90]Ibid.

[91]344 U.S. 183 (1952).

[92]Ibid., 196 (Frankfurter, J., concurring).

[93]Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[94]Supra note 2.

[95]Ibid., 506.

[96]Ibid., 509.

[97]Supra note 4 at 955.

[98]Supra note 2 at 512 (note omitted).

[99]Ibid., 512 quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[100]Supra note 4 at 955.

[101] Supra note 2 at 518 (Black, J., dissenting).

[102] See Supra note 4 at 957.

[103] Supra note 2 at 522 (Black, J., dissenting).

[104] Supra note 4 at 959.

[105] E.g., see Schiff v. Williams, 519 F.2d 257 (5th Cir., 1975); Joyner v. Whiting, 477 F.2d 456 (4th Cir., 1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir., 1972). For an early and influential treatise advocating First Amendment freedoms for the high school press, see The Report of the Commission On Inquiry. Captive Voices (New York: Schnocken Books, 1974).

[106] 419 U.S. 565 (1975)

[107] Ibid., 591 (Powell, J., dissenting).

[108] Ibid., 593. For a more thorough discussion of this case, see supra note 4 at 959-62.

[109] 441 U.S. 68 (1979).

[110] Ibid., 76.

[111] 457 U.S. 202 (1982).

[112] Ibid., 222, n. 20.

[113] Ibid., 221.

[114] Ibid.

[115] 457 U.S. 853 (1982).

[116] Ibid., 863-72. One commentator has noted that the Pico case presented two state interests which conflicted with the First Amendment rights of students under the progressive ideology: "(1) the inculcative interest of public educators and the school board's proper role in determining which values will be part of the curriculum; and (2) the school authority's interest in protecting children from vulgar and indecent -- and therefore educationally worthless -- materials." See note, supra note 4 at 965.

[117] Supra note 4 at 965.

[118] Ibid.

[119] Board of Education v. Pico, supra note 115 at 864 quoting Ambach v. Norwick, supra note 109 at 76-77.

[120] Ibid., 876 (Blackmun, J., concurring) quoting Ambach v. Norwick, supra

note 109 at 77.

[121] Ibid., 909 (Rehnquist, J., dissenting).

[122] Ibid., 879 (Blackmun, J., concurring).

[123] 106 S.Ct. 3159 (1986).

[124] Supra note 4 at 971. For a more thorough discussion of this decision, see Note, "Bethel School District v. Frazer: A Legitimate Time, Place, and Manner Restriction On Speech In the Public Schools," 32 South Dakota Law Review 156 (1987).

[125] Frazer was suspended for three days and his name was removed from a list of candidates for graduation speaker.

[126] Supra note 123 at 3165.

[127] Ibid., 3164.

[128] Ibid., 3165 citing Tinker v. Des Moines Independent Community School District, supra note 2 at 508.

[129] Ibid., 3164.

[130] Ibid., 3166.

[131] Supra note 4 at 976.

[132] 14 Med.L.Rptr. 2081 (1988).

[133] Ibid., 2082.

[134] Ibid., 2083. The practice at Hazelwood in the spring of 1983 was for the journalism teacher to submit page proofs of each issue to the principal for his review prior to publication. Ibid., 2082.

[135] 607 F.Supp. 1450 (1985).

[136] 795 F.2d 1368, 1372 (8th Cir., 1986).

[137] Ibid., 1374 quoting Tinker v. Des Moines Independent Community School District, supra note 2 at 511.

[138] 479 U.S. ____ (1987).

[139] Supra note 5 at 2084 citing Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 46 (n. 7), 47 (1983).

[140] Ibid., 2086.

[141] Ibid.

[142] Supra note 2 at 509.

[143] Supra note 5 at 2085.

[144] Ibid., 2087.

[145] Ibid., 2086 quoting Brown v. Board of Education, supra note 41 at 493.

[146] Ibid., 2084.

[147] Ibid., 2085.

[148] Ibid., 2089 (Brennan, J., dissenting) quoting Ambach v. Norwick, supra note 109 at 77 and Board of Education v. Pico, supra note 115 at 864.

[149] Ibid., 2090 quoting Tinker v. Des Moines Independent Community School District, supra note 2 at 511.

[150] Ibid. quoting Bethel School District No. 403 v. Frazer, supra note 123 at 3164.

[151] Ibid., 2091.

[152] See supra note 2 at 506.

[153] Supra note 5 at 2094.

[154] Thomas J. Emerson, "Toward A General Theory of the First Amendment," 72 Yale Law Journal 877, 878-9 (1963). For an analysis of the application of these values within the public school setting, see R. George Wright, "Free Speech Values, Public Schools, and the Role of Judicial Deference," 22 New England Law Review 59, 60-64 (Aug. 1987).

[155] Ibid., 879.

[156] Wright, supra note 154 at 62 (notes omitted).

[157] Ibid.

[158] John H. Garvey, "Children and the First Amendment," 57 Texas Law Review 321, 333 (February 1979).

[159] E.g., see FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Trachtman v. Anker, 563 F.2d 512 (2d Cir., 1977); Ginsberg v. New York, 390 U.S. 629 (1968).

[160] E.g., see Virginia Pharmacy Board v. Virginia Consumer Council, 1 Med.L.Rptr. 1930, 1935-6; Kleindienst v. Mandel, 408 U.S. 753, 762-3 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Red Lion Broadcasting Co. v. FCC, 1 Med.L.Rptr. 2053, 2062-63 (1969).

[161]Wright, supra note 154 at 63.

[162]Garvey, supra note 158 at 327.

[163]Wright, supra note 154 at 64.

[164]David A. Diamond, "The Public Schools and the First Amendment: The Case Against Judicial Intervention," 59 Texas Law Review 477, 488-89 (March 1981).

[165]Supra note 5 at 2086.

[166]Ibid.

[167]Ibid.

[168]Ibid.

[169]Diamond, supra note 164 at 506.

[170]Curriculum decision-making varies among the states, from a highly centralized model at the state level to the decentralized model at the local level. For a discussion of this issue, see Robert M. Gordon, "Freedom of Expression and Values In the Public School Curriculum," 13 Journal of Law and Education 523, 542-548 (Oct. 1984).

[171]Supra note 164 at 509.

[172]E.g., see Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 208 (1982); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[173]Note, "Constitutional Law: Freedom of Speech In the Public Schools -- Frazer v. Bethel School District Revisited," 39 Oklahoma Law Review 473, 478 (1986).

[174]426 U.S. 482 (1976).

[175]Ibid., 495.

[176]E.g., see Pinkus v. U.S., 436 U.S. 293, 299-301 (1978); Hamling v. U.S., 418 U.S. 87, 105-106 (1974); Miller v. California, 413 U.S. 15, 31-32 (1973).

[177]Hazelwood School District v. Kuhlmeier, supra 5 note at 2084.

[178]Ibid.; Frazer v. Bethel School District, supra note 123 at 3164.

[179]Tinker v. Des Moines Independent Community School District, supra note 2 at 515 (Stewart, J., concurring) quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

[180]Bruce C. Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their 'Rights'," 1976 Brigham Young University Law Review 605, 610 (1976).

[181]John Locke, "Second Treatise On Civil Government," in J. Charles King and James A. McGilvray (ed.). Political and Social Philosophy (New York: McGraw-Hill Book Co., 1973), p. 117.

[182]John Stuart Mill in Ibid., 186.

[183]Haffen, supra note 180 at 611.

[184]Ibid., quoting Henry Maine, Ancient Law (1st American ed., 1870), p. 164.

[185]Wright, supra note 154 at 69.

[186]Hafen, supra note 180 at 646.

[187]Ibid. Although the courts have extended certain procedural safeguards to juvenile hearings (e.g., see In re Gault, 387 U.S. 1 (1967)), juveniles are still not entitled to some of the "basic" constitutional rights, such as trial by jury.

[188]For an examination of the constitutional requirement that restrictions on expression must be narrowly tailored, see Nowak, supra note 71 at 868; Members of City Council v. Taxpayers For Vincent, 466 U.S. 789, 796-803 (1964).

[189]Hazelwood School District v. Kuhlmeier, supra note 5 at 2084.

[190]Ibid. quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985).

[191]E.g., see Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 654 (1981).

[192]E.g., see Leslie D. Edwards, "Justices: Principals Control All Speech," in media law notes (AEJMC Law Division Newsletter), 1, 11. Mr. Edwards, a St. Louis attorney, represented the students in the Hazelwood case.

[193]In 1985 the Supreme Court ruled that the Fourth Amendment standard of "probable cause" does not apply in the high school setting but that school officials may search for contraband (e.g., drugs) merely on the basis of a "reasonable suspicion." New Jersey v. T.L.O., 469 U.S. 339, 341 (1985).